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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2006
WAC 05 109 51259

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a President and Chief Executive Officer (CEO). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, we find that the petitioner has not presented consistent evidence regarding the beneficiary's past accomplishments and his proposed future benefits to the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The beneficiary holds a Ph.D. in Computer Science from the Technical University of Berlin. The director concluded that the beneficiary qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary

merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the beneficiary works in an area of intrinsic merit, development and marketing of software and hardware technology for retailers, and that the proposed benefits of his work, improved efficiency for retailers, would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof.

A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

In order to determine whether the beneficiary will benefit the national interest to a greater degree than an available U.S. worker with the same minimum qualification, it is necessary to understand exactly what the beneficiary will be doing in the United States and what benefits he proposes to provide. Initially, prior counsel asserted that:

> [The beneficiary] was responsible for the design and development of core products such as retail software product LUCAS (Logware Universal Commerce Application System) and loss prevention software product LORD, (Logware Data Mining), Exhibit 1. These products enable retailers to increase productivity and enhance customer benefits dramatically.
>
> [The beneficiary's] immigration to the U.S. is in the national interest because his work will benefit U.S. retail industries and create new jobs for workers in the retail business. His work will further improve the business prosperity and promote American competition in the U.S. retail industry. [The beneficiary's] immigration, in turn, will benefit the U.S. economy on the whole.

In response to the director's request for additional evidence, prior counsel asserted that the beneficiary would benefit the national interest by continuing to contribute to industry standards through the Association of Retail Technology Standards (ARTS) and through his development of a "suite of products" as founder of the petitioner, now doing business as QPOS. The beneficiary's references rely on the success of LUCAS and LORD as indicative of the success QPOS products will enjoy.

On appeal, the beneficiary, as the petitioner's representative, focuses on the success of LUCAS and LORD. The beneficiary does not discuss any success by QPOS.

Managing Director of e Informationssysteme GmbH, indicates that he established Logware GmbH in 1983. Mr. asserts that the beneficiary served as Chief of Logware's software department from April 1994 to October 2002, that the beneficiary was promoted to Chief Technical Officer in January 1999 and served as CEO since 2000. Mr. [redacted] does not indicate any current affiliation with the beneficiary or the beneficiary's current company, QPOS. Mr. [redacted] credits the beneficiary with the "design and development of both our core products: LUCAS and LORD." Mr [redacted] asserts that LUCAS has been installed "in more than 50,000 leading retailers across Europe" and is "now THE standard in [the] European retail industry." Mr. [redacted] concludes that the beneficiary's LUCAS product "will enable US retailers to increase productivity and enhances [sic] customer benefits dramatically."

According to his passport, the beneficiary obtained a Treaty Trader nonimmigrant visa in October 2002 and entered the United States in this classification on November 24, 2002. According to his Form G-

325, submitted in support of his Form I-485 Application to Register Permanent Residence or Adjust Status, the beneficiary indicated that he began residing at [redacted] in December 2002 and that he began working as President/CEO of the petitioner in January 2003. The address listed for the petitioner is also [redacted] The submitted issue of *Newsware* 2003, the "customer newsletter of" the petitioner, however, lists an address of [redacted] for the petitioner. This newsletter promotes LUCAS and LORD. The undated business plan for QPOS lists the [redacted] address and indicates that QPOS was founded in July 2001 as Logware, Inc., "a U.S.-based organization affiliated with the German company Logware Informationssysteme GmbH and financed entirely by [the beneficiary]." Section 1.5 of the business plan provides:

> QPOS is currently developing five innovative products built on Microsoft.Net technology and meeting current technology and standards requirements such as the ARTS data model, IXRetail, and Unified POS.

The products are identified as a Point of Sale (POS) product, a Merchandise Management Solution (MMS) product, a Workforce Management (WFM) product, a Customer Relationship Management (CRM) product and a Store Status Monitoring (SSM) product. The flagship product will be a "Retail management suite (RMS)." The plan predicts over $500,000 in sales by October 2004, five months prior to filing the petition. QPOS claims to have acquired two customers in 2004: Mont Blanc and Esprit. The plan indicates that the beneficiary "will serve as President of the company and will be responsible for product, consulting, sales and marketing." Finally, the marketing slogan is proposed as "Made in Germany" and the marketing includes "a booth with our partner Logware GmbH from Germany at two national conventions each year." As QPOS appears to be developing a system that will compete with LUCAS, however, it is not clear that Logware GmbH continues as QPOS' partner and would share a booth with QPOS. [redacted] Director for the German American Business Association (GABA), asserts that the QPOS is still developing its products and merely predicts that the package "promises" to have an impact in the United States.

We acknowledge the submission of the beneficiary's 2004 Form W-2, Wage and Tax Statement, issued by the petitioner for $202,500 in wages. As stated above, the beneficiary is the president and CEO of the petitioner. The record lacks evidence of any other employees. The fact that the beneficiary chooses to pay himself a large salary is not necessarily evidence that QPOS has enjoyed any success. More persuasive would be the tax returns or audited financial statements for QPOS.

As discussed in more detail below, the record does not support the affirmations of the beneficiary's main role in creating LUCAS and LORD. As will also be discussed in more detail, the record lacks evidence that QPOS has realized any success.

We acknowledge the submission of letters from satisfied customers using LUCAS and LORD that praise the beneficiary's skills and knowledge. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for

making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

First the petitioner's 2003 issue of *Newsware* credits Andreas Koschinsky with the development of LUCAS and LORD. In addition, the record contains inconsistent numbers regarding LUCAS installations. As stated above, Mr. [redacted] asserts that the number is 50,000. This number is repeated in the letter from Mr[redacted], but he fails to explain how he has knowledge of this number. A "Welcome to the Market" brochure issued by Logware GmbH submitted initially indicates that there have been more than 40,000 installations of LUCAS, LORD and LUIS. On appeal, the petitioner submits a 2005 article posted at www.epnn.com asserting that LUCAS "is widely installed in more than 8,000 tills worldwide." Another 2005 article posted at www.theretailbulletin.com confirms the 8,000 installations number. Moreover, the petitioner submits a brochure issued by Torex Retail, the United Kingdom company that purchased Logware GmbH asserting that "LUCAS has more than 7,000 retail installations." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve whether LUCAS has 50,000, 40,000, 8,000 or 7,000 installations. The higher two numbers differ significantly from the lower two numbers.

As stated above, the business plan identifies two QPOS customers acquired in 2004: Mont Blanc and Esprit. [redacted], President and CEO of Mont Blanc, affirms that he met the beneficiary in 2003 and that the beneficiary presented LUCAS to him, which he purchased. He concludes that the national interest waiver is warranted because the beneficiary has brought LUCAS to the United States, which will support U.S. retailers. QPOS, however, is not marketing LUCAS. Rather, the goal appears to be to develop a different system that will compete against LUCAS. Mr. [redacted] does not indicate that he is switching from LUCAS to a QPOS developed suite of products. In fact, on appeal, the petitioner submits Torex Retail's case study of Mont Blanc. The study indicates that in February 2004, Mont Blanc "began with the roll-out of SAP Retail in the American boutiques. The solution was to be integrated with Lucas at the point of sale." The integration "went live" in the summer of 2004 when LUCAS was installed and successfully integrated with SAP Retail. According to the submitted article "New Era on Point of Sale," SAP Retail is a Logware GmbH product. The record contains no evidence of business dealings between Mont Blanc and QPOS in 2004 as claimed. The record is absent any evidence of a business relationship between QPOS and Esprit; however, we note that [redacted] Retail's website lists Esprit as one of their own customers. The record lacks a letter from Torex Retail affirming that QPOS is their affiliate and that they do not themselves have a branch in California promoting LUCAS, LORD and other Torex Retail products.

Finally, the beneficiary's future role on the ARTS UnifiedPOS committee is uncertain. Richard Mader, Executive Director of ARTS, asserts that the beneficiary's continued presence in the United States would allow him "to continue to contribute to development of ARTS standards [and] further of [sic] the ARTS goals of increased productivity and customer services in retail through use of technology." The Internet materials for ARTS reflect that it is a "retailer-driven membership organization dedicated to creating an international, barrier-free technology environment for retailers." The materials strongly suggest that membership is made up of retail and technology companies, not individuals. For example, Microsoft and IBM are both members. The only evidence in the record of the beneficiary's participation with the UnifiedPOS Committee is an Internet archive file from 2002, when the beneficiary still represented Logware GmbH. The record lacks evidence that QPOS is a member of ARTS and that the beneficiary will continue to participate in ARTS committees.

In summary, the record lacks evidence that QPOS has enjoyed any success, despite predictions that it would show $500,000 in sales by October 2004. Any conclusion that the beneficiary's work with QPOS will benefit the national interest, therefore, must be based on the beneficiary's prior work. While the beneficiary clearly served in a significant role for Logware GmbH, the record is inconsistent regarding his creative role in the development of LUCAS and LORD, the two programs it appears QPOS will be competing against. While LUCAS and LORD have produced satisfied customers, the record is inconsistent as to the number of installations of these programs. Thus, we concur with the director that the petitioner has not established that the beneficiary's work has had a significant impact on his field of endeavor.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.